



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

**Trial Chamber I**

ORIGINAL: ENGLISH

**Before:**

Judge Erik Møse, Presiding  
Judge Asoka de Zoysa Gunawardana  
Judge Mehmet Güney

**Registry:** Mr Adama Dieng

**Delivered on:** 7 June 2001

**THE PROSECUTOR**  
**Versus**  
**IGNACE BAGILISHEMA**

**ICTR-95-1A-T**

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**Separate Opinion of Judge Asoka de Z. Gunawardana**

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1. I agree with the Judgment of Judge Møse that, for the reasons stated therein, the Prosecution has failed to prove its case against the Accused beyond reasonable doubt, and therefore the Accused is entitled to an acquittal on all the charges contained in the indictment.

#### **PART I**

#### **The Accused's Plea of Inadequacy of Resources**

- 1. The Factual Statement of the Plea**
2. In addition to the defence taken up by the Accused that, the Prosecution has failed to prove its case beyond reasonable doubt, the Defence has also raised a plea that the

Accused lacked the necessary means and the resources, to prevent the alleged commission of the atrocities, in Mabanza *commune*, and that he acted to maintain law and order, with the means available to him. This plea was taken up in the Defence Rejoinder at paragraph 248, in the following terms,

[The] defence is still that he did not participate in the alleged crimes and that he lacked adequate means to prevent such crimes.[\[1\]](#)

This plea was further buttressed by the contention of the Defence Counsel in his closing arguments by stating that,

But there is also another dimension, that is important to underscore because that highlights an aspect of our argument in relation to the innocence of Mr. Bagilishema, and that is that he did what he could within the limits of the means [and] resources available to him . . . .[\[2\]](#)

3. However, the Prosecution alleged that the Accused had control over the Hutu assailants, and that he failed to maintain law and order or to protect the Tutsi population, from the attacks.[\[3\]](#)

4. In my view, it is appropriate to treat this plea as an independent challenge to the Prosecution case, in the facts and circumstances of this case.

## **2. The Legal Position of the Plea**

5. This being a plea that involves the adducing of evidence, akin to a plea of alibi or accident, the Accused is required in the first place, to adduce sufficient evidence to put the matter in issue. In common law terms what is described as an evidential burden is cast on the Accused. This burden may be discharged by the Accused, by relying on the evidence coming from the Prosecution witnesses or by calling evidence on his behalf or by a combination of both, and thereby placing sufficient material before court, to make the plea a live issue, fit for consideration by court. When the plea has been properly raised, the onus is on the Prosecution to disprove it, beyond a reasonable doubt.[\[4\]](#) A failure to do so would raise a reasonable doubt in the Prosecution case.

6. In common law jurisdictions it is settled that, in relation to this type of plea, while the evidential 'burden' rests on the Accused, it remains at all times for the Prosecution to prove its case beyond reasonable doubt (that is, the persuasive burden remains with the Prosecution).[\[5\]](#) This principle was articulated in the House of Lords by Viscount Sankey L.C., in the English case of *Woolmington v. DPP* (1935), in a passage that has been quoted with approval in common law jurisdictions:

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the

prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.[\[6\]](#)

7. In English law, the principle that the accused only bears an evidential burden applies in defences such as self-defence,[\[7\]](#) duress,[\[8\]](#) alibi,[\[9\]](#) automatism,[\[10\]](#) and provocation,[\[11\]](#) *et cetera*. Exceptionally, a higher burden is placed on an accused, in the case of the defence of insanity, and other statutory defences, where the accused is required to adduce sufficient evidence to establish such a defence, on a balance of probability.[\[12\]](#) In Canada, according to Stuart, "[i]n the case of general justifications or excuses it is consistently held that the only burden on the accused is the evidential one . . ."[\[13\]](#); see for example, self-defence and provocation,[\[14\]](#) alibi,[\[15\]](#) duress,[\[16\]](#) and necessity.[\[17\]](#) With regard to the law in Sri Lanka, it is stated that; "In the case of defences like accident and alibi which destroy essential elements of the prosecution case, all that the accused need do is to raise a reasonable doubt in the minds of the jury as to the applicability of one of these defences. This may require the leading of some evidence, but it does not involve the obligation to establish any fact."[\[18\]](#) This Tribunal, in the cases of *Prosecutor vs Kayishema and Ruzindana* and *Prosecutor vs Alfred Musema*, has also followed the above approach.[\[19\]](#)

8. In a case before a jury, it is for the judge to determine whether, on the basis of the evidence, there is a live issue fit and proper to be left to the jury for its consideration. If the case is tried by professional judges, the judges will nevertheless consider whether there is sufficient evidence to raise the plea to a level that requires consideration by the court.

9. Once the court is satisfied that there is sufficient evidence to consider the plea, the court will then evaluate the evidence relied on by the Defence in support, and by the Prosecution to negative the plea, in order to ascertain whether a reasonable doubt has been created in the Prosecution case.

10. In the instant case, what the Accused is seeking to do by raising the said plea is to show the absence of *mens rea* in respect of the acts and/or omissions alleged against him. As stated by Counsel for the Defence in his closing arguments:

We are asserting . . . that the Prosecution never ever demonstrated that there was a voluntary attitude on the part of Ignace Bagilishema, more so, in [regard to] the intent to commit genocide, there is no evidence. [...] Our evidence shows to the contrary, that he did everything within his powers given the means at his disposal.[\[20\]](#)

11. It is to be observed that a failure on the part of the Prosecution to prove *mens rea*, which is an ingredient of the offenses preferred against the Accused, would negative any liability on the part of the Accused.

12. I will now proceed to analyse the evidence in the case, to determine whether there is sufficient evidence to sustain the plea raised by the Accused, and thereby create a reasonable doubt in the Prosecution case.

## PART II

### The Conduct of the Accused Prior to the Events in 1994

13. In order to understand the matters relating to the plea raised by the Accused in this case, it would be appropriate to begin by considering the conduct of the Accused prior to April 1994, in regard to the manner in which he acted to enforce law and order in Mabanza *commune* in general, and to protect the Tutsi population in particular.

14. The Defence asserted that Bagilishema was always a man of good character both before and after the events of 1994. The Accused consistently acted in good faith for the protection of the law abiding Tutsis and Hutus alike.

15. The stand taken by the Prosecution in regard to the prior conduct of the Accused varied at different times. At one stage the Prosecution rejected a request by the Defence to make a formal admission as to the good character of the Accused prior to April 1994.<sup>[21]</sup> However, at another stage, the Counsel for the Prosecution stated that the Prosecution did not challenge the, "impeccable character [of the Accused] prior to the events in the indictment."<sup>[22]</sup> Furthermore, the Prosecution did not seek to cross-examine the evidence of Defence witnesses in regard to the character of the Accused.<sup>[23]</sup> In addition, some of the Prosecution witnesses themselves testified to the good conduct of the Accused prior to 1994.

16. In this context, it is pertinent to recall the remark made by Counsel for the Prosecution that, the Accused acted in good faith prior to 12 April 1994, "We accept that more likely than not, up until that time [12 April 1994], he did that in good faith. We make no bones about that. And I want that to be crystal clear. There is no evidence to suggest otherwise."<sup>[24]</sup>

#### 1. The Prior Conduct of the Accused as Testified to by Witnesses

17. The Defence Witness BE said of the Accused, "I can mention some of his achievements. The first is that unity was installed in his *commune*. Secondly there was development in the community, thirdly, there was no discrimination on ethnic grounds in that *commune*."<sup>[25]</sup> Defence Witness TP, in describing the Accused's performance of his duties, stated: "Ignace Bagilishema was a devoted man who carried out his work with a sense of commitment and fairness. Someone who was listened to, who had good reputation in his *commune*."<sup>[26]</sup> According to Defence Witness RA, the Accused was a tolerant man and Mabanza was a *commune* where Hutus and Tutsis had lived together in peace. Defence Witnesses AS, KC and ZD gave similar accounts of the good relationship of the Accused with the entire population of Mabanza.

18. Prosecution witnesses also testified to Bagilishema's good conduct prior to the events in 1994. When asked how the Accused was perceived by the general population, Prosecution Witness I testified:

Bagilishema was someone who was loved by all the people both Hutus and Tutsis. When they had problems they would go to him for advice and he would provide such advice. And during the war when in 1994 houses started to be destroyed people fled towards the *bureau communal* in large numbers. This means that he was loved by a lot of people and nobody thought that any harm would come to himself in the presence of Bagilishema.[27]

19. Prosecution Witness K, in his written statement of 10 July 1999, [28] stated that Bagilishema "was on good terms with all the peoples, i.e. until the President's death." [29]

20. That the Tutsi members of the population trusted the Accused is borne out by their conduct; when the attacks on Tutsis and their property started around 7 April 1994, many of the Tutsis who had fled from these attacks, gathered at the Mabanza *bureau communal* for safety.

21. The evidence of expert witnesses suggests that Bagilishema had been one of the most successful *bourgmestres* in the area of development. Prosecution expert Professor Guichaoua testified that, in his assessment, the Accused ranked as the second most efficient *bourgmestre* in regard to the handling of development issues in the *communes*. [30] Defence expert François Clément confirmed that the Accused had made a positive contribution to development of his *commune*. Defence witness Jean François Roux who, up to April 1994, had been a project leader on a development project in Kibuye Prefecture opined that the Accused was a 'good *bourgmestre*' and followed development projects very closely. The witness did not notice any discrimination on ethnic grounds. [31] He added that the Accused had managed to maintain calm during the turbulent times between 1992 and April 1994, when other *communes* were troubled by ethnic conflict. [32]

## 2. The Response of the Accused to the Threat of RPF Infiltration

22. Documentary evidence tendered by the Prosecution itself shows that, on several occasions, the Accused investigated persons suspected of illegal possession of firearms or of collaborating with the RPF. In a letter, dated 9 October 1990, written by the Accused to the *préfet* of Kibuye, the Accused sent a 'Report of People Suspected of Holding Rifles Illegally' and attached a list of such persons. [33] The list included predominantly 'intellectuals' but the ethnic group of many was not indicated. In the introduction to the letter, it was stated as follows: "Given the current situation, I write to you this letter in order to give you a list of people who are suspected of having rifles." And concluded by stating that, "A search of rifles has been carried out in almost all their houses but no single rifle has been found. We are still investigating but it is not easy to find rifles with those people. The population have confirmed that they (those people) might possess rifles."

23. In a second letter, dated 20 October 1990, [34] the Accused sent a list of "persons who are suspected by the population," to the President of the security council of Kibuye. Again, the list was predominantly made up of 'intellectuals' and, although some were described as Tutsis, the ethnic group of others was uncertain. The letter ended by stating,

"I send them [the names] to you following what people say and know about them but I do not confirm for sure that what they are charged with is really true."

24. The Prosecution produced four further letters, written by the Accused to the *préfet* of Kibuye, attaching lists of persons suspected of joining the Inkontanyi; dated 23 October 1992, 30 December 1992, 14 January 1993, and 12 March 1993.<sup>[35]</sup> The opening paragraph of the first letter, dated 23 October 1992 noted as follows:-

With reference to the prevailing rumors that some young men join the Inkontanyi, I would like to let you know that I assigned the "*conseillers*" to follow up this issue and they submitted to me the attached list.

25. It is apparent that by 'Inkontanyi', the Accused was referring to those persons who collaborated with the RPF, rather than Tutsi persons in general. Indeed, in the list attached to the letter dated 23 October 1992, which was the only list to indicate the ethnic group of the suspects, two of the five suspects were recorded as 'Hutu'.

26. When questioned about the above letters, the Accused explained that members of the Hutu population had suspected certain Tutsis of being RPF collaborators and of possessing weapons, and therefore wanted to attack them. The Accused successfully diffused this situation by setting up a verification committee, to search the premises of suspected collaborators for weapons.<sup>[36]</sup> He added that the higher authorities in Kibuye had urgently required the lists of persons suspected of collaborating with the RPF, and that it was his duty as *bourgmestre* to report such matters to his superiors.<sup>[37]</sup> This is evidenced by a letter, dated 14 April 1992, from the intelligence service of Kibuye Prefecture to all the *bourgmestres*, requiring the *bourgmestres* to provide a list of persons who had gone into neighbouring countries shortly before or during the war, and who had returned. The said letter required the *bourgmestres* to furnish details of such persons including the name, age, ethnic group, the place of origin, the present location, and whether there were suspicions that any of them had undergone military training with the RPF.<sup>[38]</sup>

27. It is important to note that the two letters dating 9th and 20th October 1990 were written in the weeks immediately following the invasion of Rwanda, in October 1990, by the RPF. The four letters dating from October 1992 to March 1993 were sent in a period of continuing high tension and ongoing conflict with the RPF.

28. I am of the view that the Accused took reasonable and proper measures when responding to threats, whether perceived or real, of RPF infiltration. The Accused properly pointed out that, when there was no evidence to confirm the suspicions of the population, he did not confirm the truth of the information. The lists do not indicate an ethnic bias on the part of the Accused. It may be noted that the Accused was merely performing the official duties of the office he held under the functioning government of the day, in Rwanda.

### **3. The Action Taken by the Accused Regarding the Attacks on Tutsis by Hutu Groups**

29. The security issues facing the Accused in the years leading up to 1994 were not limited to the threat of RPF infiltration. He was also confronted with the problem of individual attacks on Tutsi persons and property by Hutu assailants. In a letter, dated 7 January 1993, from Bagilishema to *préfet* Kayishema, the Accused outlined the specific attacks by the Hutus on Tutsi persons and/or their properties, and requested the assistance of the *préfet* to restore security. The letter stated as follows:-

. . . I regret to inform you, once more, that in the night of 4/1/1993, Hutus again attacked the home of a Tutsi, GAFARANGA, breaking the door of his house.

In the night of 6/1/1993, in spite of your promise to provide us soldiers, no soldiers came. I left with three policemen and one IPJ and we laid ambush at a place called MUGOTE, Kabili cellule; we were able to apprehend . . . [named persons] who were armed with clubs, bludgeons and hoes. They were heading for an attack. We arrested them at 12:00 midnight. We deplored the fact that on reaching another hill, we noticed that the Hutu had attacked the house of SEKABUNDI . . . . These attacks are perpetrated while the Tutsi have left their homes and are afraid to call for help, for fear of being located and killed. This does not allow security officers to come to their assistance, since they are not well informed of the sites of the attacks and also because the sector is immense.

In the night of 6 to 7/1993, the police, assisted by soldiers, tried to ensure security in MUBUGA cellule, BUHINGA sector. They were attacked and had to fire into the air. On account of their limited number, in KAGANO cellule, KIGEYO sector, a man called SEBACOGOZA was attacked; his house was destroyed and his cattle were stolen . . . .

I thank you for the assistance we hope you will continue to afford us in order to restore security.[\[39\]](#)

30. The above letter provides a picture of the security situation that the Accused had to face in early 1993. It is apparent from the contents of the letter that the Accused attempted to use the available security resources to protect the Tutsi population from attacks by Hutus, indeed, he personally searched for and arrested Hutu attackers.

31. Thus on an analysis of the above evidence it is clear that the Accused performed the functions of his office prior to 1994, without any ethnic discrimination, to prevent the attacks on the Tutsi population by the Hutus.

#### **4. The Significance of the Previous Conduct of the Accused**

32. It may be noted that, by the nature of crimes that may be committed during a national or international emergency, persons with no prior convictions or history of violence may commit such crimes.[\[40\]](#) However, the probative value of the evidence relating to prior conduct will depend on the circumstances of the individual case. In the present case, the evidence shows more than mere prior good character or lack of previous disposition by the Accused to commit such crimes. It indicates that, prior to the events in 1994, the Accused had consistently conducted himself in a manner that is completely at odds with the conduct alleged by the Prosecution during the events in 1994.

33. In addition it may be observed that the Prosecution did not adduce any evidence of the conduct of the Accused, prior to April 1994, upon which the Prosecution can rely to show that the Accused had a propensity to commit the crimes with which he is charged.

Thus it becomes all the more important, for the Prosecution to prove that the Accused formed or manifested the requisite *mens rea*, as well as committed the requisite criminal acts, at least during the events in 1994.

### PART III

#### The Conduct of the Accused During the Events in 1994

##### 1. The Alleged Change of Conduct of the Accused

34. In relation to the *mens rea* of the Accused, the Counsel for the Prosecution submitted that it was at the alleged meeting of 12 April 1994, between the Accused and *préfet* Kayishema, at the Mabanza *bureau communal*, that the Accused changed from having a *bone fide* intent to protect the Tutsis, to a genocidal intent to exterminate the Tutsi population on ethnic grounds. It is significant to note that the Counsel for the Prosecution in his closing arguments stated as follows:

You see, I think that my learned friend [for the Defence] seems to get the impression that we [...] are saying that the witnesses were deliberately gathered at the Mabanza *Commune* office as a scheme to eliminate them. We don't say that. We accept that more likely than not, up until that time, he did that in good faith. We make no bones about that. And I want that to be crystal clear. There is no evidence to suggest otherwise. No evidence to suggest that up until that time, he was gathering people there with a view to, you know -- no, no, no, no. We say that everything changed at that time, after that meeting [of the 12 April 1994], and everything that happens flows on from there. We make that clear distinction. So when they come and say well, he is a man of good character, [...] I make no bones about that.[\[41\]](#)

35. Inherent in the above assertion of the Prosecuting Counsel, are several weaknesses. In the first place, is it realistic for such a drastic change of attitude to occur in such a short and impromptu meeting? There is no evidence to show that it was a pre-planned meeting. And the meeting is alleged to have lasted only for a few minutes. There was no suggestion of a significant persuasive effort by Kayishema to change the previously held disposition of the Accused towards the Tutsis.

36. Secondly, there is no clear proof that such a meeting ever took place. In fact the finding made in regard to the meeting in the Judgment of the majority is that there is no credible evidence that such a meeting took place.[\[42\]](#)

37. Thirdly, the conduct of the Accused does not bear out that he had a change of attitude. The Prosecution sought to interpret the sending of the refugees, by the Accused, to Kibuye town, to suggest a change of conduct. However, this action has been clearly explained and dealt with in the Judgment of the majority, where a finding is made that directing the refugees to Kibuye town does not entail any liability on the part of the Accused, and that it was done for other reasons.[\[43\]](#)

38. Fourthly, the alleged manifestation of a genocidal intent, and the existence of a conspiracy to commit genocide, is negated by the evidence of Prosecution Witness A who stated that, when he was in Kibuye Stadium in April 1994, the Accused had invited the refugees to go back to Mabanza, since peace had been restored. Witness A testified,

Following that, between the 13th and the 18th, they [the Accused, Semanza and Dr Leonard] came back to say that we could go home, we could go back home because peace had been restored.[\[44\]](#)

39. In this context, it is also to be noted that Witness A, in his written statement to investigators, dated 29 June 1999, makes mention of the request by Bagilishema for the refugees to come home to Mabanza.[\[45\]](#)

40. To say the least, it is inconsistent for a person who has joined in a conspiracy with Kayishema to take the refugees to Kibuye Stadium and Home St. Jean to exterminate them, thereafter to invite the refugees back, before the objective of exterminating them has been achieved.

## **2. The Use of the Security Resources by the Accused**

### ***2.1 The Security Resources Available to the Accused in April to July 1994***

41. The Defence argued that the Accused could not control the events due to the inadequacy of resources. The Defence has submitted that,

Because of the scant means at his disposal Bagilishema was not able to reestablish security in his *commune* for all the time that the Abakiga were there, i.e. until about 25 April 1994. After that date, the situation in the *commune* was a bit less chaotic and Bagilishema did all he could to resume his activities as *bourgmestre* despite the difficulties and threats still made against him. [\[46\]](#)

42. The Prosecution argued that the Accused did not even attempt to control the situation but, rather, encouraged and took part in the attacks in Mabanza *commune*.

43. The available resources must be considered in light of the geographical size and population of Mabanza *commune*. Mabanza *commune* was 160 square kilometers in extent.[\[47\]](#) It had a mixed population of Hutus, Tutsis and Twas. According to the statistics available for 1988, the population was around 49,250.[\[48\]](#) This number would have increased considerably due to the influx of refugees from April 1994.

44. It is not in dispute that, at the time of the events, there were only six communal police officers, a brigadier and an assistant brigadier, stationed in Mabanza. According to the Accused there should have been, at least, one communal police officer per *secteur*; Mabanza *commune* having fourteen *secteurs*. It is also worth noting that, Article 107 of the *Loi Sur Organisation Communale*, dated 23 November 1963, contemplates having one communal police officer per one thousand of the population. The said Article further provides for that number to be increased or decreased, in exceptional circumstances, with the authorization of the interior minister.[\[49\]](#) Hence, the legal requirement would be about fifty communal police officers for Mabanza *commune*, with the possibility of this number being increased in exceptional circumstances. However, at the relevant time the Accused only had about one-tenth of this figure, despite the added need for security personnel due to the influx of the refugees in April 1994. Thus it is apparent that the Accused was thoroughly handicapped by the lack of personnel to maintain law and order.

45. There was no specific evidence led at the trial with regard to the arms and ammunition available to the security forces in Mabanza *commune* at the time. The position taken up by the Accused was that the arms and ammunition were thoroughly inadequate to control the situation. According to the Accused, the Brigadier had about twelve Enfield rifles. And the evidence indicates that there were only one or two vehicles belonging to Mabanza communal office, and that the police did not have a vehicle.<sup>[50]</sup> Hence it is clear that with regard to availability of arms, ammunitions and the vehicles, the situation was equally vulnerable.

46. It is evident from the letter mentioned earlier, dated 7 January 1993, from Bagilishema to *préfet* Kayishema,<sup>[51]</sup> that when the Mabanza *commune* experienced ethnic strife in 1993, although less serious than that encountered in 1994, the security resources available even at that time were insufficient to effectively maintain law and order. This was because the enormity of the size of the area to be covered ("the sector is immense"); the fact that Tutsis were afraid to call for help ("for fear of being located and killed"); and, the lack of security personnel ("on account of their limited number"). In January 1993, the Accused had requested, from *préfet* Kayishema, soldiers to help provide security from the Hutu attacks. Apparently, these reinforcements were never supplied, "in spite of your promise to provide us soldiers, no soldiers came."

#### 2.1.1 *The Request by the Accused for More Resources*

47. In the wake of the deterioration of the law and order during the events in 1994, the Accused had specifically asked for reinforcements from his immediate superior, Clement Kayishema, the *préfet* of Kibuye. It may be noted that the *préfet* is the proper authority from whom such assistance had to be requested according to the administrative hierarchy.

48. The Defence pointed out that the power to call for assistance from the armed forces, according to the *Décret-Loi* dated 11 March 1975, is clearly vested with the *préfet*, and that the *bourgmestre* did not have such power.<sup>[52]</sup> The Defence added that, at that time, there was a war in Rwanda, and the Army was engaged in the fight against the Rwandan Patriotic Front's army on the front line. Hence the Accused could not call for assistance directly from the armed forces.

49. The Accused testified that he made his first request for reinforcements on 9 April 1994, during a security meeting chaired by *préfet* Kayishema, and attended by members of UNAMIR.<sup>[53]</sup> He had requested the allocation of sufficient means to fend off the attacks. However, because all the *bourgmestres* requested reinforcements, the security council had allocated only a limited number of *gendarmes* amongst the *communes*. Therefore, although the Accused insisted on being assigned a large number of *gendarmes* immediately, the Accused was provided with only five *gendarmes* to help secure the situation in the whole of Mabanza.<sup>[54]</sup> Further, the five *gendarmes* were only provided for four or five days, and were subsequently withdrawn on 13 April 1994.

50. The Accused decided to ensure the security at the *bureau communal* with the six policemen, who were to take their turn on day and night shifts, guarding the *bureau*

*communal* and the refugees who had gathered in large numbers. The Accused had wanted the *gendarmes* also to be placed at the *bureau communal*, but the *gendarmes* had preferred to be at Mushubati because of the security problems in that *secteur* and due to the availability of accommodation. On Saturday, 9 April, he had worked together with *gendarmes* in Kibingo, Rukagarata and Nyagatovu *secteurs* where refugees came through from Kavoye *secteur*. On Sunday, 10 April, the Buhinga and Mushubati *secteurs* were attacked; the Accused posted two *gendarmes* and one policeman there. The Accused testified that he and the security forces "worked continuously day and night so as to go round these sectors but we were not able to diffuse the situation."[\[55\]](#)

51. The Accused added that, on no less than three consecutive days *viz*, the 10th, 11th and 12th April 1994, he had requested reinforcements from the *préfet's* office in Kibuye, but that "every time I called . . . the prefecture I was told that they were sent to other places."[\[56\]](#) On Sunday 10 April, he called during the day and in the evening gave a security report to *préfet* Kayishema by phone; at that time he specifically stated that a large number of *gendarmes* were required. On Monday 11 April, he spoke to Gashongore, the *sub préfet* on two occasions. When asked if these were the only occasions that he phoned the Accused replied, "I phoned them up always and then in the evening I had to make a report on the phone. I could call two or three times a day when I came back to the communal office from the various *secteurs*."[\[57\]](#) That security reports were provided is evidenced by a letter dated 10 April 1994, from *préfet* Kayishema to the Minister of the Interior, wherein the *préfet* provided an account of the reports from all *bourgmestres* in Kibuye Prefecture, during the period from 6 April to 10 April 1994.[\[58\]](#) The Accused testified that he was consistently informed that there were no more *gendarmes* available.

52. After 13 April, the Accused had given up asking for reinforcements, particularly since the *gendarmes* who were already assigned to him on 9 April 1994, had been recalled. The Accused stated that he had posted the *gendarmes* at strategic points in the *commune* but they were ineffective as they were clearly out numbered by the attackers, and also because they did not have their own transport.

53. The Accused again requested reinforcements from the *préfet* by way of a letter, dated 24 June 1994.[\[59\]](#) In that letter he had informed the *préfet* of impending attacks from Hutus from Kayove and Rutsiro *communes*, and had requested urgent assistance from the *préfet* in order to prevent the attack. He testified that he received no assistance.

54. It is apparent that the resources that were available to the Accused in mid April 1994 were far from adequate, to bring about peace in Mabanza or to maintain law and order on any significant level. However, from 25 April to late June 1994, after the Abakiga attacks had subsided, the available resources were utilised to maintain law and order to some degree. The security measures implemented by the Accused during this period are examined below. However, even during this period of relative calm, the limited resources were not sufficient to police the entire *commune*. It is evident from the letter dated 24 June 1994, that the Accused considered his resources inadequate to prevent the imminent attacks by Hutus from Kayove and Rutsiro *communes*. It is seen

from the efforts made by the Accused as referred to above, that the Accused had exhausted all the options available to him to obtain reinforcements, but without success.

## **2.2 *The Situation that the Accused had to Contend With***

55. In order to get a clear picture of the situation that prevailed in Mabanza *commune*, during the period from April to July 1994, it is appropriate to review the events that took place during that period, as they unfolded.

56. That massive attacks by Hutus began in Mabanza from about mid April 1994 is not in dispute. While the Defence argued that Mabanza was overrun by an uncontrollable mass of invaders known as the Abakiga, the Prosecution contended that the Abakiga did not overwhelm the *commune*. However, the stand taken by the Prosecution regarding this issue varied at different times.[\[60\]](#)

### **2.2.1 *The Conditions that Prevailed in Mabanza Commune from 6 to 12 April 1994***

57. The Prosecution and Defence witnesses testified that following the crash of the President's plane on 6 April 1994, Tutsi civilians were attacked and their properties destroyed, in Mabanza *commune*. Due to these attacks thousands of men, women and children, predominantly Tutsis sought refuge in, amongst other places, Mabanza *bureau communal*. These facts are not in dispute.

58. The Accused described the situation during this period in the following way, "[t]he people [of Mabanza] organised by facing up to the attackers who came from the river . . . In any event, the people tried Sunday, Monday and Tuesday but up to Tuesday evening [12 April], the whole *commune* was on fire."[\[61\]](#)

### **2.2.2 *The Invasion of the Abakiga; 13 to 24 April 1994***

59. The evidence indicates that the Abakiga invaded Mabanza *commune* on 13 April 1994 and thereafter. Prosecution and Defence witnesses described how hordes of Hutu attackers from the northern region, identified as Abakiga, beset the *commune*. The attackers were distinctively dressed in banana leaves, and carried traditional weapons. Prosecution Witness I described the Abakiga as "people who come from the highlands . . . These are the people who came to our *commune*, who . . . launched an attack. They looted and killed."[\[62\]](#) Asked if he had an opportunity to see the Abakiga come down from the hills into Mabanza, Witness I replied that he saw the attackers come down from the hills in groups of no less than two hundred.[\[63\]](#) Asked if the arrival of the Abakiga had any connection with the death of the President, Witness I replied,

Yes, the arrival of the Abakiga had some kind of relation to the death of the president because they were saying that the president was killed by the Inkotanyi so the Abakiga came down to fight the Inkotanyi. There was a war and they wanted to revenge the death of their president at the hands of the Inkotanyi.[\[64\]](#)

60. Defence Witness RA, who agreed that it seemed like an invasion, described the event in similar terms:

From our home we can see a hill that faces north, and at a point in time we saw people coming down and we were wondering what was going on there, and yes, this is how I came to know that it was the Abakiga who were coming. There were many. [O]n the next day they came very early and this continued almost . . . every morning . . . . They were no longer people. They were wild animals . . . . They were shouting, they were carrying machetes and traditional weapons.[65]

61. Defence witnesses RA, BE, ZJ and TP confirmed that, around 12 April 1994, there were rumours of an imminent attack on the refugees at the *bureau communal* in Mabanza, by the Abakiga, who were coming from Rutsiro. The Accused testified that in the morning of 13 April 1994, he received a phone call from the *bourgmestre* of Rutsiro, informing him of the advance of the Abakiga to Mabanza *commune*, and it was on that basis that he had asked the refugees to go south, to Kibuye town, for protection.

62. The evidence shows that, following the invasion of the Abakiga, they proceeded to kill Tutsis and loot properties in Mabanza and neighboring Gitesi *commune*. Prosecution and Defence witnesses testified to the Abakiga attacking the refugees at the *bureau communal* on 13 and 14 April 1994. They killed Pastor Muganga and attacked Karungu's house on 13 and 14 April 1994. They laid siege on the religious community of nuns on 14 and 16 April. In Gitesi *commune*, the Abakiga participated in attacks at the Home St. Jean Complex on 17 April 1994, and the attack on the Stadium on 18 April. In all events, witnesses identified the Abakiga by their distinctive dress and testified that they attacked in large numbers, often in the hundreds.

63. According to the evidence, local bandits, and those sometimes described as *interahamwe*, joined the Abakiga in their attacks on the Tutsis and the looting.

64. Thus, from an analysis of the evidence, it appears that Mabanza *commune* was overrun, on the 13 April 1994 and on subsequent dates, by murderous hordes of Hutu men from the north, known as the Abakiga, and their collaborators. As a consequence, Mabanza *commune* sank into a confused and chaotic state.

### 2.2.3 *The Conditions that Prevailed in Mabanza Commune from 25 April 1994 to July 1994*

65. With the easing of the Abakiga attacks in the area, around 25 April 1994, a period of relative calm ensued. This is evidenced by the communal Register of Outgoing Mail,[66] which shows an increase in the administrative activities of the *communal* office from 25 April 1994, compared to a lull in such activity during the period 13 to 25 April 1994. It was during this period that, according to the Accused, he managed to restore some order and arrest certain persons involved in criminal activities.

66. However, during May and June 1994, Mabanza still suffered from isolated attacks by local Hutu militia. This is apparent from the evidence led by the Prosecution in relation to the killings of Kanyabugosi, the sons of Witness B, and of Tutsis concealed in Habayo's house, along with the arrest of Habayo. The Accused testified to threats of further incursions into Mabanza, by groups of Hutus, from neighboring *communes*, in

June 1994. His evidence is supported by a letter, dated 24 June 1994, from him to the *préfet*, which stated,

According to the information at our disposal, the preparations of a series of attacks are reportedly under way in ZONE MURUNDA and ZONE RUTSIRO (Northern Rutsiro) of Rutsiro *commune*; the attacks target MABANZA *commune* between 1<sup>st</sup> and 5<sup>th</sup> July 1994, under the pretext that accomplices are still hidden in Mabanza.<sup>[67]</sup>

67. It is important to note that, according to the evidence, by late April 1994, the bulk of the Tutsi population in Mabanza had fled the area or had gone into hiding.

### **2.3 The Use of the Available Resources by the Accused**

68. The Defence submitted that, the fact that the Accused had used the available security resources, to the maximum, to maintain law and order, shows his *bone fides*. In particular, the Accused had used civilians to maintain law and order as night patrols and to man the roadblock. He also had held a number of pacification meetings throughout Mabanza *commune*. On numerous occasions the Accused had used the available resources to protect persons and property, by preventing crime and taking action to punish the perpetrators of crime.

69. Contrary to the Defence, the Prosecution alleged that the Accused held meetings whereby he encouraged the attacks. Although the Prosecution accepted that the Accused assisted certain Tutsis during the events, it argued that the Accused acted selectively.<sup>[68]</sup>

#### **2.3.1 Using Civilians for Security**

70. In the wake of the attacks, the Accused supported the formation of cross-ethnic night patrol groups and organised civilian defence measures in Mabanza *commune*, initially from 7 to 12 April. The night patrols were set up to protect the population, irrespective of ethnicity, in the *commune*. The evidence suggests that the night patrols did not continue after 12 April 1994, due to the imminent attacks by the Abakiga. Defence Witness BE stated:

[B]ecause it was from that day, people from Rutsiro, that's the Abakiga, started saying that the refugees who were at Mabanza communal office, including Hutus who were not helping the Abakiga, were going to be killed. It was on that day [12 April] that there was a major attack carried out by the Abakiga who came down from the hills and people were afraid and the groups collapsed and people ran away.<sup>[69]</sup>

71. Asked about specific measures that had been taken to strengthen the security after 25 April, the Accused testified that, at that point in time, they had tried to elect in each *cellule*, people who would be added to the five members of the *cellule* committee. Then the *cellules* would have fifteen people in all, responsible for the maintenance of law and order to face up to attacks from the Abakiga, if they were to come back.

72. The Accused also made use of civilian volunteers to man the Trafipro roadblock that was located close to the *bureau communal*. The Accused admitted having set up the Trafipro roadblock, and authorising civilians to operate it. The Prosecution alleged that

this roadblock had been set up on 14 April 1994, however, according to the Accused, this measure was not taken until the end of April 1994. This measure was in line with the Prime Minister's request to *préfets*, in a letter dated 27 April 1994, referred by *préfet* Kayishema, to the *bourgmestre* on 30 April, in which the Prime Minister had requested, *inter alia*, that official roadblocks should be set up to prevent infiltration by members of the RPF.<sup>[70]</sup>

### 2.3.2 Holding Pacification Meetings

73. The Chamber has already analysed in length the Prosecution and Defence evidence relating to the meetings held in Mabanza during the events.<sup>[71]</sup> Therefore, only a brief reference to the evidence of pacification meetings, in the context of this plea, would be appropriate.

74. The Accused testified to holding pacification meetings in May and June 1994, after the major attacks of Abakiga had stopped around 25 April 1994. In particular, the Accused explained that he had written to the *conseiller* of Kibilizi *secteur*, asking him to organise in Kamusanganya *cellule*, a meeting on 5 May 1994, for the election of a committee to restore peace.<sup>[72]</sup> Another meeting on 6 May 1994 with representatives of the Churches and political parties followed. In his testimony the Accused stated as follows:-

I wanted first of all to put myself together with the political party representatives so that we can speak the same language before the next meeting of all these other people.[...]the intent was to ensure security within the *commune* and also to face up to the possible attacks that would come from outside. You should not forget the fact that the country was at war. We wanted to keep away the infiltration by the RPF.<sup>[73]</sup>

75. In accord with the testimony of the Accused in respect of the above meeting, Defence Witness ZJ testified that he attended a meeting chaired by the *bourgmestre* at the beginning of May. He explained that members of all the political parties were present and that the meeting took place at the *bureau communal*. The subject at that meeting was how to restore security and peace in the *commune*. The Witness ZJ stated that,

[t]he *Bourgmestre* explained the situation which was prevailing within the *commune*, and he said that since everybody had seen this and was aware, the security had been disturbed by those who came from outside the *commune*, and he insisted that people come together, and they should no longer fight one against the other . . . . He said that those who had not been killed, and who were in hiding should be kept well, and he said that he no longer wanted to hear of any killings. He spoke of a project which would involve setting up committees in sectors and cellules in order to safeguard the property of these people.<sup>[74]</sup>

76. A number of witnesses testified that they heard the Accused make public speeches on similar lines, in April to June 1994. Witness AS was with the Accused on about 13 April 1994, when the Accused addressed a group of Abakiga and exhorted them to stop looting. Witness WE testified that, towards the end of April, he attended a meeting held by the Accused at which he was urging the audience to distinguish between the RPF, the real enemy of the people, and the Tutsis. At that meeting the Accused told the people not to listen to the propaganda from the Abakiga and the *interahamwe*, who came to kill and loot.<sup>[75]</sup> Witness ZD attended two meetings, in May or June 1994, where the Accused

implored the people to stop pursuing Tutsis. Witness KA spoke about a meeting in Gihara *secteur* at the end of May or early June, at which the Accused encouraged the people to do everything possible to prevent the Abakiga from killing and looting.[76] Witness KC had attended two meetings in June, where the Accused had urged the people to ignore the Abakiga who were trying to divide them, and affirmed that the only enemy was the RPF.[77]

77. The Prosecution Witness Q, a Tutsi woman married to a Hutu man, stated that she survived attacks after seeking help from the Accused. She explained that the Accused had held a meeting at the *bureau communal* where he stated that Tutsi women married to Hutu men should not be killed. The Accused later gave the husband of Witness Q two letters to be read out to the assailants, which stated that they should no longer participate in the killings and that those who searched for Tutsis to be killed would have to answer for their actions.

78. The above witnesses are consistent with regard to the message that Bagilishema sought to deliver to his people. It is apparent that the Accused, in holding such meetings, advocated solidarity amongst the people of Mabanza in two main aspects. First, that the people should stop attacking the Tutsis. And second that the people should recognise that the real enemy is the RPF and not the Tutsis generally. This is consistent with the position taken up by the Accused at the trial.

### 2.3.3 Providing Assistance in the Face of Attacks

79. The Accused testified to the assistance that he had given to a religious community of nuns, in April 1994. Witness RA, who is a senior nun in a religious community, corroborated the Accused and further explained that, in the afternoon of 14 April 1994, the religious community was provided with the assistance of a policeman, by the Accused. On that day, the Abakiga had left, after the religious community had given them money. The witness testified that, on the morning of 16 April 1994, the Abakigas returned in their hundreds. On this occasion also, the religious community had again given money to the Abakigas, and the policemen had fired in the air to disperse them. In the afternoon of 16 April, the Abakiga had come again and said that, if on the following day the Tutsi sisters were still there, then the entire religious community would be wiped out. Witness RA explained that on 17 April 1994 she, along with five other Tutsi sisters, went to the *bourgmestre* for help. The Accused provided a false Hutu ID card for one of the sisters at their request, and offered them a place to hide in the IGA building of the *bureau communal*. The Prosecution does not dispute these matters.[78]

80. The Accused had also requested civil officials of Mabanza *commune* to provide protection for Tutsis, their property, or those who had assisted Tutsis. For example, on 5 May 1994, the Accused sent a letter to the *conseiller* of Mushubati *secteur*, urging him to provide special protection for a family who had hidden a Tutsi in their home.[79] On 9 May 1994, he wrote to the *conseiller* of Buhinga *secteur*, asking him to protect a Tutsi woman who had been threatened.[80] And on 19 and 20 May 1994, he sent letters to the *conseiller* of Gihera *secteur*, and to a committee that had been set up to recover property,

requesting them to ensure that the property abandoned by displaced Tutsis, was not misappropriated.[\[81\]](#)

#### 2.3.4 *Hiding Tutsis in His Home*

81. The Accused also testified to hiding Tutsis in his home, including Witness RJ and her two children, a girl named Chantal, two orphans, and Pastor Muganga's wife and children. Defence witnesses RJ, AS, and RB corroborated his evidence. Witness RJ, a Tutsi, described how she had sought refuge in the *bourgmestre*'s house and was hidden by the Accused for about a month, along with her two children and a Tutsi girl named Chantal. Eventually the Accused issued Witness RJ with a false ID card, and Chantal with a *laissez-passer*, both documents stating that the holder was a Hutu, thus enabling them to travel. Defence Witness AS confirmed that, around mid April 1994, he had seen Chantal, a Tutsi, hiding in the home of the Accused.

82. According to Witness AS, who was a Pastor himself, the Accused had helped Pastor Muganga, and had assisted Pastor Muganga's wife and children to escape. In her written statement, Defence Witness RB stated that in April 1994, immediately after the death of President Habyarimana, Pastor Muganga's wife and her children hid in the residence of the Accused. And that the Accused ultimately helped Pastor Muganga's wife and her children to escape.

83. The Rwandan confessional statement of Prosecution Witness Z shows that Pastor Muganga had hidden in Bagilishema's home.[\[82\]](#)

#### 2.3.5 *Issuing False Identification Documentation*

84. The Accused testified that he had issued false Hutu ID cards to Tutsis from Mabanza and *laissez-passers* to Tutsis from outside Mabanza. He explained that this was done deliberately by certifying Tutsi persons as Hutus, in order to save lives. He had issued about 100 such documents during the events.[\[83\]](#) The Prosecution did not dispute that the Accused issued false ID cards and *laissez-passers* but contended that this demonstrates how he used his power and authority, selectively.[\[84\]](#)

85. Defence Witness WE testified that the Accused gave him a Hutu ID card to be given to a certain lady, and ten other blank ID cards, signed by the *bourgmestre*, to be filled in by Tutsis from Mabanza who were, at the time, resident in Kigali. The act of issuing ten blank ID cards goes contrary to the assertion by the Prosecution that the Accused acted selectively. Witness KC testified that the Abakiga had laid siege on a house where he had been staying, looking for the Tutsis who were there. The witness explained that, fearing the return of the Abakiga, he had gone to see the *bourgmestre*, who had issued "Hutu" *laissez-passers* for four persons, who later escaped to Zaire. Witness RA testified that the Accused provided a false ID card to one of the Tutsi sisters from the religious community.

86. In this context it may be noted that the Prosecution adduced no evidence to indicate that the Accused acted on a selective basis and refused to issue identification documentation to a Tutsi person, describing him as a Hutu, upon such a request being made.

87. The Accused also testified to ordering false entries in the *Registre des Residents*,<sup>[85]</sup> in regard to the ethnicity of the Tutsi refugees, who had to obtain resident's permits from the *bureau communal*. He explained that a person from another *commune*, who remained in Mabanza *commune* for more than three days, had to be recorded in the *Registre des Residents* in order to obtain a resident's permit. The resident's permit indicated the ethnic group of the holder. The Accused stated that he had authorised entries in the *Registre des Residents* and had issued resident's permits, which indicated that the persons were Hutus, whereas in fact they were Tutsis, in order to save lives. According to the Accused, up to 60% of the ethnic identities recorded in the *Registre des Residents* had been falsified, upon his instruction. He added that all the Tutsis who had been issued resident's permits during the events in 1994, in Mabanza, were issued resident's permits, which indicated that they were 'Hutus'.<sup>[86]</sup>

### 2.3.6 Punishing the Perpetrators of Crimes

88. According to the Accused, after around 25 April 1994, he had re-gained enough control in his *commune* to arrest and transfer to the Prosecutor in Kibuye, those persons suspected of murder or other crimes against Tutsis. Notwithstanding the inadequacy of security personnel, the Accused testified that, between May and June 1994, he had transferred sixteen people to the Public Prosecutor in Kibuye, for alleged crimes.

89. Evidence of these transfers is contained in the communal Register of Outgoing Mail. For example, the Accused referred to a letter sent on 27 April 1994, to the Prosecutor of the Republic, which is recorded in the communal Register of Outgoing Mail,<sup>[87]</sup> concerning the transfer of the suspects in respect of the murders of Biziyaremye and Bampunirineza. Further, in a letter of 3 May 1994, to the Prosecutor of the Republic,<sup>[88]</sup> the Accused stated that he is transferring five named persons accused of killing a certain Kangabe, on ethnic grounds. Numerous other arrests and transfers are documented in the Register of Outgoing Mail, which indicates that letters of transfer, dating from 24 May through to 12 July 1994, were sent by the Accused to the Prosecutor, in Kibuye.<sup>[89]</sup>

90. The Accused further pointed out that, by letters dated 2 May 1994, he had suspended his own communal driver, Ephraim Nshimyimana, and a communal policeman, Anastase Munyandamutsa, because they had stolen the engine from the car of a Tutsi refugee.<sup>[90]</sup> The Accused had placed them at the disposal of the Office of the Public Prosecutor, in Kibuye, and had requested an investigation.

91. The Prosecution accepted that sixteen people were arrested and transferred to the Prosecutor in Kibuye, but pointed out that no such transfers were recorded from 8 to 25 April 1994.<sup>[91]</sup> In this regard, the Accused testified that during that period, the

administrative activities of the *commune* were paralysed. He added that, from about 13 to 25 April 1994, there were thousands of attackers coming from the North, who could not be identified, but after that period it was much easier to identify those who had committed the crimes.<sup>[92]</sup> This explanation of the Accused is consistent with the evidence relating to the invasion of Mabanza *commune* by the Abakiga, from about 13 April 1994, and the level of violence that ensued, thereafter.

### 2.3.7 *Appealing to Higher Authorities*

92. The Accused testified that, on 25 April 1994, he attended a meeting in Kibuye town, with *préfet* Kayishema and the other *bourgmestres*<sup>[93]</sup> where he deplored the massacres that had occurred in Kibuye town, and had requested the superior authorities to avert such situations in the future.<sup>[94]</sup> Soon thereafter, on 3 May 1994, the Accused went to Kibuye town again to attend a meeting with Jean Kambanda, the Prime Minister.<sup>[95]</sup> At that meeting the Accused asserted that, he raised the issue of the massacres with the Prime Minister and, in particular, the requirement to attend to the needs of the victims of the atrocities, committed in the region.<sup>[96]</sup>

93. There is no independent evidence to support the above testimony of the Accused, however the Prosecution has not proved otherwise. If it were to be accepted that the Accused made these appeals to higher authorities, it would reflect his *bone fide* intention to help the refugees. However, whether such entreaties would have borne fruit, has to be assessed in the light of the reality of the situation that prevailed in Kibuye Prefecture at that time. According to the Prosecution, the civil authorities of Kibuye and the Gendarmerie National played a central role in the massacres in Kibuye town. Indeed, the *préfet* of Kibuye, Kayishema, who is the hierarchical superior of the Accused, has been convicted by this Tribunal for leading the massacres at the Kibuye Stadium and Home St Jean.<sup>[97]</sup> The Prime Minister, Jean Kambanda, has confessed to his role in supporting the genocide.<sup>[98]</sup> This would have obviously limited the ability of the Accused to seek punishment for those involved in the massacres in Gitesi *commune*, where the Kibuye Stadium and the Home St. Jean are situated. Although the appeals made by the Accused to the *préfet* of Kibuye and to the Prime Minister were the appropriate steps to take, according to the administrative set up that existed at that time, however the matter of favourable response was outside his control.

## 2.4 *Some Additional Factors that Impaired the Ability of the Accused to Use the Resources*

94. In addition to the inadequate resources available to the Accused during the events, the Defence adduced evidence of several other factors, which affected the ability of the Accused to protect the Tutsis and to maintain law and order.

### 2.4.1 *The Attacks on the Accused by the Abakiga*

95. The Accused testified that, on 13 April 1994, the Abakiga came even to his house in order to seek out Tutsis that he was hiding there. He explained, the Abakiga “threatened

me, telling me I am an Inyenzi, an Inkotanyi”, and they asked where I had hidden the Tutsis at the communal office. He added, “seeing how ferocious they were, I gave them 10.000 Francs for them to leave my house and they left. . . .” The evidence of Witness RJ appears to corroborate this event. Witness RJ, a Tutsi, testified that, from 8 April 1994, she had sought refuge in the *bourgmestre*’s house. She was hidden by the Accused in the servants' quarters, along with a Tutsi girl named Chantal. The witness testified that the Accused "came to see us once because the Abakiga were coming to attack and he wanted to warn us. He advised us to close the door, and that’s what we did. [. . .] We heard the noise that they were making during the attacks, and we would also hear the whistles they were blowing. . . ."[99]

96. Further support for this incident is contained in the Rwandan confessional statement of Prosecution Witness Z, dated 22 June 1998, wherein he stated,

On 14/4/94 . . .the former assistant *bourgmestre* [Semanza] ordered those who were with him (the Abakiga he was lodging) to bring along the Tutsi[s] who had taken refuge at the *Bourgmestre*'s house. Immediately, they all went to the *Bourgmestre*'s home where they caused disturbances, which frightened the *Bourgmestre*.[\[100\]](#)

97. Witness KA testified in court that, he had been told, by two people, about an attack on the *bourgmestre*'s house.

98. This is the first example of the direct challenge to the authority of the Accused by the Abakiga.

99. A second confrontation occurred a few days later. The Accused stated that, on 18 April 1994 at about at 8 a.m. he, escorted by two policemen, and accompanied by some Pastors and *conseillers* of the neighbourhood, confronted the Abakiga, at the Rubengera Parish. He addressed the group of about 100-200 Abakiga and asked them “never to come back again to Mabanza” and added “[y]ou are looking for enemies, and there are no enemies in Mabanza.” However, the Abakiga disregarded his plea. The Accused was humiliated and, according to him, felt that he was "nothing in front of [his] people."[\[101\]](#) Witness RA, corroborating the Accused, testified in court that Pastor Eliphase, who had been with the Accused at the time, had informed her of this incident.

100. Prosecution Witness Z testified to a similar confrontation between the Accused and the Abakiga, although it is unclear whether he was referring to the confrontation on 18 April 1994. He stated that one morning before killings at the Gatwaro Stadium, the Accused held a meeting at Rubengera Parish where he addressed the Abakiga. The Accused had told the Abakiga that he had “had enough of their killings and that they should stop the killings [...]”.[\[102\]](#)

101. As well as the above confrontations that he had experienced with the Abakiga, the Accused further testified that, on 14 April 1994, the Abakiga looted the home of his parents. He added that the Abakiga took "everything, the sofas, the chairs, food, everything."[\[103\]](#)

102. Thus, the evidence from both Prosecution and Defence witnesses shows that the Accused had been threatened by the Abakiga in his own home and had been confronted by them on other occasions, in Mabanza. These incidents illustrate that the Abakiga did not respect the authority of the Accused and were not amenable to the commands of the Accused.

#### 2.4.2 *The Accused Considered as an Accomplice of the RPF*

103. The Accused testified that he was considered to be an accomplice of the RPF by some of the Hutu attackers. He denied that he was in fact an accomplice, and stated that he always tried to defend his *commune* against the RPF infiltration and invasion. In the letter, dated 24 June 1994, from Bagilishema to *préfet* Kayishema, the Accused referred to a series of imminent attacks on Mabanza, from Rutsiro *commune*, and emphasised that "they have also dared to include myself among the accomplices stating that I am married to a Tutsi woman." [104] He explained in his testimony in court that, "there were several reasons [why I was suspected to be an accomplice] I mentioned that of having been congratulated on Radio Muhabura, there was also the fact that I was married to a Tutsi woman . . . ." In response to a question from the Bench, "your position that the people in the North suspected you as an accomplice is stated in this letter clearly . . . . That is your position even today here?" [105] The Accused answered in the affirmative. In my view, this letter, written during the events, lends strong support to the assertion by the Accused that he himself was considered, by the attackers from the North, as an accomplice of the RPF.

104. According to the Accused, a further reason why he was considered as an accomplice was because of the announcements on the Radio Muhabura, which was a radio station that supported the RPF. Witness BE testified to hearing an announcement, just before the refugees were sent to Kibuye on 13 April 1994, which congratulated the Accused by stating that, "all other *bourgmestres* should follow the example of the *bourgmestre* of Mabanza." Witness ZD testified to hearing on Radio Muhabura, between 11 and 17 April, an announcement, which stated that, "they were grateful for . . . how Ignace behaved in order to contain the situation and also to protect his people." [106] This evidence is consistent with the position of the Accused that Radio Muhabura had made positive announcements, in mid April 1994, concerning him. This also confirms the Prosecution admission that, the Accused acted in good faith, prior to 12 April 1994.

105. There can be little doubt that a *bourgmestre* supporting the genocide was likely to wield more influence over the attackers and therefore be able to control them, than a *bourgmestre* who was seen as neutral or opposed to the genocide. Thus the evidence seems to indicate that the Accused, as a *bourgmestre* falling into the latter category, would not have been able to influence or control the Abakiga.

#### 2.4.3 *The Relationship of the Accused with Semanza*

106. The Defence submitted that before and during the events, Bagilishema had lost control over his assistant *bourgmestre*, Célestin Semanza, due to political power that

Semanza had built for himself and his association with the Abakiga.[\[107\]](#) In addition, Semanza was planning and plotting to get rid of the Accused from his position, so that Semanza could become the *bourgmestre*. This struggle persisted until the departure of the Accused in July 1994, when Semanza achieved his objective, and succeeded the Accused as *bourgmestre* of Mabanza. The Defence argued that this further undermined the ability of the Accused to maintain law and order.

107. The Prosecution argued that the Accused had deliberately created the impression that he had problems with Semanza, in order to distance himself from the atrocities committed by Semanza, for which he is responsible.[\[108\]](#)

108. The Accused testified that, prior to 1994, he wanted to send Semanza back to the Ministry of Interior:

Mr. Semanza Celestin became unmanageable. I tried to manage him, so I had suggested that he be sent back to the Ministry, the civil service but the *préfet* did not, yes the *préfet* did not comply with my request. He did not want to support my proposal which I had sent in.[\[109\]](#)

The Accused gave as reasons that Semanza had embezzled money,[\[110\]](#) attended work only whenever he wanted, become ill disciplined, and was uncontrollable.

109. Evidence of this fractious relationship can be found in letters written even before 1994; the substance of which was not disputed by the Prosecution.[\[111\]](#) A letter dated 16 December 1992,[\[112\]](#) from Bagilishema to Semanza, and the reply thereto, dated 17 December 1992,[\[113\]](#) concerned Semanza's absence from work. The letters indicate that the two men had a relationship of distrust; in the said reply, Semanza stated "if you were not setting a trap for me, it would be incomprehensible that you should be denying that you actually gave me permission yourself."

110. In another letter, dated 19 December 1992, from Bagilishema to Semanza, Bagilishema wrote:

I am sorry to inform you that it is not good to lie and especially to lie in order to incriminate your superior. [...] Since you have always tried to outsmart your superior and shy away from other important, official duties, I am forced to send you back at the disposal of the supervisory ministries which employed you.[\[114\]](#)

The Accused testified that it was not within his power to dismiss the assistant *bourgmestres*. Therefore, he had sent this letter to the Ministry of Interior with a view to having Semanza sent back, but he had not received a response. The Accused explained that, following the refusal of his superiors to remove Semanza, Semanza felt "untouchable and did whatever pleased him."[\[115\]](#) The evidence of the Accused is in accord with the opinion of Prosecution expert witness Andre Guichaoua, who opined that, a *bourgmestre's* powers were proportional to the influence that he wielded with the higher government officials, at the national level.

111. The evidence indicates that the political rivalry between the Accused and Semanza began in 1992 and continued right up to the events in 1994. According to the Accused, it was following the introduction of multipartyism in 1992 that his relationship

with Semanza, who was the secretary of the rival *Mouvement Démocratique Républicain (MDR)* Party, deteriorated. Each of the political parties wanted to have a representative in the *commune*. Witness ZD, who was at the time of the events a senior official of an opposition political party, stated that in 1994 most of the people in Mabanza belonged to the MDR party. He added that the strategy of the opposition parties was to replace Bagilishema (the MRND candidate) with the MDR candidate, Semanza, and that Semanza had the support of the top MDR party official. Witness ZD agreed that Semanza was acting "in an irreverent manner, particularly in 1994."[\[116\]](#) Defence Witness KA testified that in mid April, it was Semanza who was in control of the *commune* "during that period the MDR was stronger because the MDR members were the majority [. . .] Semanza was, therefore, the favourite of the people, so to speak, and had an eye on the position of *bourgmestre*."[\[117\]](#) He added that, during the MDR meetings, the members used to sing that the *bourgmestre* should resign. Expert witness Jean-Francois Roux who, up to April 1994, had been a project leader on a development project in Kibuye Prefecture, also confirmed that there had been a conflict between Bagilishema and Semanza. He added that he had personally received a letter from Semanza, wherein Semanza questioned the authority of Bagilishema.

112. The assertion by the Accused that his fractious relationship with Semanza continued throughout the events, until July 1994, is evident in a letter dated 24 June 1994, from Bagilishema to *préfet* Kayishema.[\[118\]](#) Therein, the Accused referred to his problems with his political rivals: "I would like to inform you that this rumour is spread, by my political opponents, whose intention is to take my place." He explained in testimony that he had in mind, amongst others, Semanza. In response to a question from the Bench "[a]nd that is the position that you are taking up in this court even today, that Semanza was designing or planning to take over from you?" the Accused answered in the affirmative.

113. The Prosecution did not dispute that Semanza ultimately achieved his objective of becoming the *bourgmestre* of Mabanza, for he succeeded the Accused as *bourgmestre*, in which post he remained until his arrest in November 1994.[\[119\]](#)

#### 2.4.4 *The Relationship of Semanza with the Abakiga*

114. Prosecution and Defence witnesses testified that, during the events, Semanza had been closely associated with the Abakiga. The Accused and Witness KA stated that Semanza came from the same region as the Abakiga. The Prosecution did not dispute these assertions. Indeed, it was part of the Prosecution case that Semanza was acting in concert with the Abakiga and other attackers.

115. Witness KA testified that, in mid April 1994, he had observed a meeting outside the Rubengera School where Semanza was addressing a group of Abakiga and others. Semanza exhorted the other young men from Mabanza to help the Abakiga kill the Tutsis and to loot. According to the said witness, Semanza was acting as a political leader of the Abakiga.

116. Evidence also suggests that Semanza had been lodging Abakiga in his home, during the events. Witness Z, in the Rwandan confessional statement, dated 22 June 1998, stated "[o]n 14/4/94 . . . the former assistant *bourgmestre* ordered those who were with him (*the Abakiga he was lodging*) to bring along the Tutsi who had taken refuge at the *bourgmestre's* house." [120] (Emphasis added)

117. It is apparent from the above analysis that the relationship of the Accused with his assistant *bourgmestre* Semanza was one of distrust and rivalry. Therefore, it is reasonable to infer that, during the events, the Accused had no significant control over Semanza, which debilitated his authority.

## PART IV

### Documentary Evidence that Corroborates

#### the Position Taken Up by the Accused

118. It is to be observed that several aspects of the position taken up by the Accused are corroborated by independent documentary evidence. In that regard two of the documents already mentioned, deserve further analysis, since they lend support to the defence case as a whole: *viz.*, the letter from Bagilishema to *préfet* Kayishema, dated 24 June 1994, and the confessional statement of Prosecution Witness Z, dated 22 June 1998.

#### 1. The Letter Dated 24 June 1994 (Prosecution exhibit 84)

119. The letter sent by the Accused to the *préfet* Kayishema, dated 24 June 1994, bears such significance to the defence taken up in this case, that it requires careful consideration. It is important to note that, although this letter was written in June 1994, it lends corroboration to the defence the Accused has taken up in this trial, almost six years later. The Accused certainly could not have envisaged facing a trial of this nature at the time that he wrote the letter. Hence it enhances the credibility of the matters urged therein. The Accused had written this letter on 24 June 1994, to Kayishema, who was the *préfet* of Kibuye Prefecture, stating that he was considered to be an accomplice, by the Hutu attackers from the north, because he was married to a Tutsi woman. The matters arising from this letter were clarified, when the Accused gave evidence in court, on 7 June 2000.

120. The Accused had asserted in the said letter that the rumor that he is an accomplice had been spread by his political opponents, whose intention it was to take his place. On being questioned by the Bench he explained as follows;

Q. In that letter in the first paragraph, the last sentence, you have asserted that that the-- they have also [dared] to include myself among the accomplices stating that I am married to a Tutsi woman. You have stated that.

A. Yes, Your Honour.

Q. That is exactly the position you are stating in this Court today also, that you were suspected as an accomplice?

A. There were, there were several reasons, I mentioned that of having been congratulated on Radio Muhabura, there was also the fact that I was married to a Tutsi woman and so on and so forth. But it was supposed that my wife was Tutsi. But as I have said my wife, my wife's mother was Tutsi and her father is Hutu.

Q. That is clear. But your position that the people in the north suspected you as an accomplice is stated in this letter clearly, isn't that what you have stated in? That is your position even today, here?

A. Yes.

Q. Then the second sentence in the second paragraph, we do not want to be considered as defeated so that people from Kayove and Rutsiro *communes* need to come to loot at any time. What do you mean by defeated, there?

A. I wanted to say that we were under siege by this population who came under the pretext of looking for accomplices and they came and they looted in any manner that they wish.

Q. What, what do you understand by the term accomplice? What did you really mean to convey?

A. In my understanding, this is someone who was working with the RPF-- for the RPF.

Q. So, that is what you intended to convey when you used the word accomplice in the letter?

A. Yes, indeed, Your Honour.

Q. Then on the third paragraph you have explained the problem about your wife, and you go on to assert that you are [accused of being] an accomplice because they think that you support the Hutu who are married to Tutsi women, that is one reason. The second reason is that you are supporting the Tutsi population?

A. Yes, that is so, Your Honour.

121. The Accused pointed out that there were imminent attacks from the north. It is to be observed that the main complaint in the said letter was the imminent attacks from zone Murunda and zone Rutsiro (Northern Rutsiro). He specifically requested the *préfet* to do his, "utmost to stop these attacks . . ." and stated ". . . that is why your assistance is urgently solicited." The Accused in his evidence explained the situation in the following terms;

Q. Then in the final paragraph, therefore, I would like the honourable *préfet* to request so and so. And you are then in the final paragraph, second sentence, you have taken up a particular position that should be prevented, that is which can result in confrontation between Hutus, you are referring to the Hutus in the north, then Hutus in Mabanza *commune*. And in that context you have stated that what we presently need, the most is, the unity to face the Inyenzi/Inkotanyi. What did you mean by that?

A. What I meant was that if these people from the north were to attack Mabanza *commune* in particular, if they were to attack me in person, I had my family, I had my family and my friends, we could be involved in killings and then there were people who were on the other side in Gitarama, they could use this to kill all of

us. So, I was thinking that it would be a good idea that we come together because together we stand, so that we can face up to the RPF Inkotanyi attack.

Q. So . . . was it your intention to point out the common enemy?

A. Yes, that's quite so.

Q. And the common enemy you have identified in this letter to be the Inkotanyi and the Inyenzi?

A. Yes, Your Honour, you are right.

Q. And that is the position you are taking up in this Court even today, that not the Tutsi population but the Inkotanyi and Inyenzi are the enemies of the people?

A. Yes, it's still the same position and I'm saying that if people from inside had come together we wouldn't have had to leave our country.

122. Although the said request was made for urgent help in earnest, it was the evidence of the Accused that no such assistance was given;

Q. Now, was there any action taken by the prefect of the Kibuye in consequence of this letter?

A. I gave him this report but he never gave me any reply.

Q. In other words, he didn't give you any support or pursue the complaint, [or] take any suitable action in pursuance of your request?

A. He didn't take any measures but as far as I am concerned, I was to give him a warning in case something happen, in case I die so that people are aware of the conditions under which I was killed. That was my aim.

Q. Have you made similar representation to any other authority at about that time?

A. No, this is the only letter that I wrote, and the nearest authority to me was the *préfet*, the others, it wasn't easy for me to reach them.

123. It is discernible from the above analysis of the said letter as testified to by the Accused, that the position he takes up in court now in regard to the following matters is the same.

1. The fact that the resources available to him in June 1994 were inadequate.
2. That there was an imminent attack from the North at that time.
3. That he believed that he was considered an accomplice by the Hutu attackers.
4. That his communal employees undermined him.

124. The Prosecution interpreted the letter differently. According to the Prosecution, the Accused wrote the letter to Kayishema to inform him that additional

Hutu attackers were no longer necessary in Mabanza *commune*.<sup>[121]</sup> The interpretation placed by the Prosecution is unsupported, and does not bear scrutiny.

125. The Prosecution further argued that the statements contained in the letter that Mabanza was "self-sufficient" and would "defend itself" indicated that the Accused had control over the events.<sup>[122]</sup> However, the statement by the Accused that Mabanza was "self-sufficient" may be interpreted to mean that the people of Mabanza were able to check for RPF accomplices, rather than having the ability to fight the Hutu attackers from other regions. And, the statement that Mabanza would "defend itself", appeared to predict an unwanted confrontation between Hutus at a time when the available resources are needed to defend against the RPF threat. It is clear that the main purpose of writing the said letter was to outline the problems in regard to security in Mabanza, and to request urgent help from the Kibuye authorities. If Bagilishema had been in control of the situation, there would have been no reason to make such an urgent request to the *préfet*.

126. Thus the position of the Accused taken up in court is corroborated by the contents of the said letter which was written as far back as June 1994. Although the said letter was written in June 1994, it appears to mirror the situation in Mabanza *commune*, during the period April to July 1994. And it may properly be deduced that the security problems faced by the Accused in April 1994 were even greater, than those faced in late June 1994, when the said letter was written.

## **2. The Confessional Statement of Prosecution Witness Z**

### **(Defence exhibit 112)**

127. Corroboration of the Defence case is also found in the confessional statement of Prosecution Witness Z.<sup>[123]</sup> Witness Z made this confession to the Rwandan authorities, on 22 June 1998, long before his first witness statement to Tribunal investigators on 18 September 1999, and his testimony before this Chamber on 8 February 2000. At no point in his confessional statement did Witness Z directly implicate the Accused. It is reasonable to assume that at the time when Witness Z made his confessional statement to the Rwandan authorities, he did not know that he would be testifying against the Accused. In the course of his confession, in relation to his role in the killing of Pastor Muganga, Witness Z stated the following:

On 14/04/94, at about 9am, he came out of the Rubengera school complex where he worked and sought refuge in the home of *Bourgmestre* Bagilishema Ignace; but before he arrived there, he was first stopped by a man named Semanza, then *Bourgmestre* Assistant . . . ; and later, he was saved by a man named Gafurafura Isaie. From there, he went to the *Bourgmestre's* house. At about one hour later, the former assistant *Bourgmestre* [Semanza] ordered those who were with him (the Abakiga he was lodging) to bring along the Tutsi[s] who had taken refuge at the *Bourgmestre's* house. Immediately they all went to the *Bourgmestre's* home where they caused disturbances, which frightened the *Bourgmestre*. [...]

128. The above statement by Witness Z, a Prosecution witness, lends independent corroboration to the position of the Accused in relation to the following;

1. That a Tutsi had taken refuge in the Accused's home.

2. That Abakiga were lodging in assistant *bourgmestre* Semanza's home and they obeyed his orders.
3. That Abakiga caused disturbances at the Accused's home on 14 April 1994.
4. That Abakiga frightened the Accused.

129. Further, it is implicit in the act of Semanza ordering the Abakiga to bring the Tutsi hiding in the *bourgmestre's* house that Semanza defied the authority of the Accused and that they were at cross purposes. This incident highlights the animosity that prevailed between the Accused and Semanza. The fact that Semanza had the audacity to order the Abakiga to trespass upon the home of the Accused to seize the Tutsi refugee who had sheltered there, shows that Semanza had little or no respect for the authority of the Accused.

### Conclusion

130. It is clear from the above analysis of the evidence in this case, that the Accused has established the plea set up by him, that the resources which were available to him were inadequate to prevent the massacres of the scale that took place in Mabanza *commune*, from April 1994, and that he acted to maintain law and order in the *commune*, with the means available to him. Moreover, the Prosecution has failed to disprove this position. Thus, the Accused has negated one of the ingredients of the offences that he is charged with *viz., mens rea*. Thereby, a reasonable doubt has been raised in the Prosecution case, which should enure to the benefit of the Accused, resulting in the Accused being entitled to an acquittal, on this ground too.

131. Accordingly, I hereby acquit the Accused Ignace Bagilishema, of all the charges, contained in the indictment.

Done at Arusha  
On this seventh day of June 2001

Asoka de Z. Gunawardana  
Judge  
International Criminal Tribunal for Rwanda

Seal of the Tribunal

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[1] Defence Rejoinder brief, 29 September 2000, at paragraph 248

[2] Transcripts 4 September 2000 at page 184

[3] Counsel for the Prosecution stated "Your Honour, the issue here is not as to whether or not the Accused had power to act to stop this. The issue is that he never tried. The fact is that he never tried, and there is enough evidence to prove this beyond reasonable doubt. There is also evidence to prove that he actually encouraged and took part in the attacks that took place in Mabanza *commune* and also was present during the attack at the Kibuye Stadium." Prosecutor's Closing Arguments, 18 October 2000 at page 219

[4] See Stuart, *Canadian Criminal Law*, 3<sup>rd</sup> Ed., (1995): "In the case of general justifications or excuses it is consistently held that the only burden on the accused is the evidential one of pointing to evidence putting the defence in issue. There is no departure from the general rule that the Crown must prove guilt beyond a reasonable doubt and therefore no reversal of the onus of proof which would be subject to Charter review. The Crown must negative a justification or excuse. Where the defence is not put in issue by the Crown case, the accused has a duty of adducing some evidence although this does not mean he has to prove anything or to testify." (pages 425-436). See also the English Court of Appeal in *Gill* (1963), 2 All E.R. 688 (C.C.A): "The accused, either by the cross-examination of the prosecution witnesses or by evidence called on his behalf, or by a combination of the two, must place before the court such material as makes duress a live issue fit and proper to be left to the jury. But, once he has succeeded in doing this, it is then for the Crown to destroy that defence in such a manner as to leave in the jury's minds no reasonable doubt that the accused cannot be absolved on the grounds of the alleged compulsion." (page 691).

[5] Civil law systems, applying the principle *dubio pro reo*, also operate to give the benefit of the doubt in the prosecution's case to the accused. For example, in French law the prosecutor must adduce sufficient evidence - *preuve suffisante* – to convince the court of the guilt of the accused. Under the German code of criminal procedural law the judge, functioning in an inquisitorial capacity, is required to consider any defence that may arise from the evidence in the case, and the burden of proving the case rests upon the prosecution, no matter which defence has been raised.

[6] *Woolmington v. DPP* (1935) A.C. 462, (HL), at pp. 481-482

[7] See e.g., *R v Folley* [1978] Crim.L.R.556; *R v Abraham* [1973] 1 W.L.R. 1270

[8] See e.g., *R v Gill* [1963] 47 Cr.App.R. 166; *R v Bone* [1968] 52 Cr.App.R. 546

[9] See e.g., *R.v Denney* [1963] Crim.L.R.191; *R. v Wood* [1968] 52 Cr.App.R. 74

[10] See e.g., *R v Dervish* [1868] Crim.L.R. 37; *R v Stripp* [1978] 69 Cr.App.R. 318

[11] See e.g., *Chan Kau v R* [1955] A.C. 206; *R v Wheeler* [1968] Crim.App.R. 28

[12] See Cross and Tapper on Evidence, 8th ed., 1995, (Butterworths), at page 131

[13] Stuart, *Canadian Criminal Law*, 3<sup>rd</sup> Ed., (1995) at page 425. Stuart further noted that any requirement that an accused must prove his plea on the balance of probabilities has been specifically rejected in Canada. In the case of *Whyte* (1988) 64 C.R. (3d) 123 (S.C.C.), Chief Justice Dickson remarked: "The exact characterisation of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. [...] If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused."

[14] See e.g., *Latour* [1951] S.C.R. 19; *Linney* [1977] 32 C.C.C. 294

[15] See e.g., *R. v Lizotte* [1951] S.C.R. 115; *R. v Lanigan* [1984] 53 N.B.R. 388 (CA)

[16] See e.g., *Bergstrom* [1980] 13 C.R. (3d) 342

[17] See e.g., *Perka* [1984] 42 C.R. (3d) 113 at 137

[18] G.L. Peiris, *The Law of Evidence in Sri Lanka*, (1974), at page 429

[19] In these cases the burden placed upon an accused has been addressed only in relation to the plea of alibi. In *Prosecutor vs Kayishema and Ruzindana*, Trial Chamber II stated: "The burden of proof rests upon the Prosecution to prove its case beyond a reasonable doubt in all aspects notwithstanding that the Defence raised alibi . . . . The accused is only required to raise the defence of alibi . . . ." (*Prosecutor vs Kayishema and Ruzindana*, (ICTR-95-1-T) Judgment, 21 May 1999, at paragraph 234). Similarly, in *Prosecutor vs Alfred Musema*, Trial Chamber I held: "The onus is on the Prosecution to prove beyond a reasonable doubt the guilt of the Accused. In establishing its case, when an alibi is introduced, the Prosecution must prove, beyond a reasonable doubt, that the Accused was present and committed the crimes for which he is charged and thereby discredit the alibi defence. The alibi does not carry a separate burden of proof. If the defence is reasonably possibly true, it must be successful." (*Prosecutor vs Alfred Musema*, (ICTR-96-13-T), Judgement, 27 January 2000 at paragraph 108). This approach is supported implicitly by the Statute and Rules of the Tribunal, whereby the Accused is presumed innocent until proven guilty (Article 20(3)), and where a finding of guilt may be reached "only when the majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt" (Rule 87 (A)).

[20] Transcripts 19 October 2000 at page 144

[21] When this matter was raised during the testimony of a Defence witness, the Counsel for the Prosecution gave the following response: "We propose to make no admissions. [...] The admission referred to in this document are already referred to in the court record, and my learned friend can refer to those transcripts in his closing arguments and consider them as admitted, if he needs to; . . . ." Transcripts 2 June 2000 at page 7

[22] Transcripts 2 May 2000 at pages 12-13

[23] See e.g. in relation to Mr. Francois Roux, an expert witness for the Defence, Counsel for the Prosecution stated: "I propose on behalf of the Office of the Prosecutor that this statement can simply be admitted in evidence as an exhibit. We do not propose to cross-examine this witness if it is solely character evidence . . . . We can move on to other matters this morning, if it is established of course that he is not a witness of fact in relation to events between April and June 1994." Transcripts 4 May 2000 at page 7

[24] Transcripts of closing arguments, 18 October 2000 at page 65

[25] Transcripts 27 April 2000 at page 35

[26] *Ibid* at page 133

[27] Transcripts 23 November 1999 at page 25

[28] Defence exhibit 14

[29] A minority of witnesses held a different view. Witness G stated that the Accused "stopped loving" the Tutsis in 1990, after the outbreak of the war. However, Witness G appears to have based her view on a personal experience relating to her father and uncle which, on examination of relevant documentation, appears to be objectively unjustified. (See, Chapter V (3.4) of the Judgment of the majority). Prosecution Witness J spoke of ethnic discrimination in Mabanza, particularly in the area of education, but documentary evidence suggests that, if there was ethnic discrimination in Mabanza, it was not on the part of the Accused.

See for example, in 1992, the issue of ethnic discrimination in education arose in connection with the Director of the school in Mushubati *secteur*, Mabanza *commune*. In that instance, Hakizimana, the Communal Secretary, wanted to remove the Director claiming that he had allegedly been favouring Tutsis in the school. The issue was addressed by a Commission chaired by the Accused. It is clear from the Commission's report, dated 21 September 1992 and signed by the Accused, that Bagilishema had (unsuccessfully) attempted to reconcile the differences between the Director and Hakizimana without further investigation, having given both parties an opportunity to present their case. There is no indication that the Accused sided with Hakizimana notwithstanding that he was the Communal Secretary and had alleged that the Director was "favouring one of the ethnic groups in Mushubati to such an extent that, practically, all people found there were Tutsi." Following a hearing, the Commission's findings were as follows: "Our wish has been to lighten the issue and to reconcile you, but we note that neither of you has the will to be reconciled with each other. Consequently, since you do not want us to help you reconcile, we are going to refer this matter to the courts, since it is beyond our powers. It will then be up to them to resolve it and punish the person at fault." Thus, having exhausted his efforts to reconcile the parties, the Accused properly referred the matter to the courts.

[30] Transcripts 14 February 2000 at page 43

[31] Transcripts 4 May 2000 at page 23

[32] *Ibid* at page 27

[33] Prosecution exhibit 91

[34] Prosecution exhibit 90

[35] Prosecution exhibits 80, 81, 82 and 83 respectively

[36] Transcripts 8 June 2000 pages 43 - 50

[37] Transcripts 1 June 2000 page 147

[38] Defence exhibit 88

[39] Defence exhibit 90

[40] See "Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*", of 17 February 1999, in the case of *Kupreskic et al*, ICTY.

[41] Transcripts of closing arguments, 18 October 2000 at pages 65 – 66

[42] See, Judgment of the majority, Chapter V

[43] See, Judgment of the majority, Chapter V

[44] Transcripts 17 November 1999 at page

[45] Defence exhibit 7

[46] Defence Closing Brief at page 114

[47] Defence exhibit 80 is a map of Mabanza *commune*

[48] Defence exhibit 85

[49] The *Loi Sur Organisation Communale*, dated 23 November 1963 is one of the main legal texts updating those of the first Republic. See Expert Report by Professor Guichaoua "Local Government in Rwanda", dated August 1998, at page 8. Prosecution exhibit 71.

[50] See e.g., Francois Clement, transcripts 29 May 2000 at page 22

[51] Defence exhibit 90

[52] See Article 11 of the *décret-loi* of 1975, which addresses the requisition power of the armed forces by the *préfet*. Article 103 of the *Loi sur l'organisation communale* of 1963 states that the *préfet* can put at the disposal of the *bourgmestre*, elements of the *gendarmerie nationale*. Article 7 of the *décret-loi portant création de la gendarmerie nationale* of 1974 states that any commander of *gendarmes* may, if faced with insufficient resources, require the assistance of detachments of the Rwandan army.

[53] It is not in dispute that the Accused attended the said meeting.

[54] Transcripts 2 June 2000 at page 74

[55] *Ibid* at page 82

[56] *Ibid* at page 86

[57] *Ibid* at page 88

[58] Prosecution exhibit 76

[59] Prosecution exhibit 84

[60] For example, when responding to questions in relation to the 'invasion' on 13 April 1994, the Counsel for the Prosecution provided a confusing response: "Well, first of all, we have to accept that both he [the Accused] and his colleague [the former *bourgmestre* of Rutsiro] lacked the necessary control over these Abakiga, that is if they ever existed, anyway. I don't accept that they did. And even if they did, . . . I take the view, rather, that there is nothing that was done in Mabanza that Mr Bagilishema was not in control of. I don't accept that he was overwhelmed by the Abakiga or anything. [...] There were no Abakiga coming to overwhelm anyone anywhere. There was plan in place, there was no need for any Abakiga to go anywhere." Transcripts of closing arguments, 18 October 2000 at pages 45-46. Thus the Counsel for the Prosecution asserted that the Accused lacked the necessary control over the Abakiga and then immediately contradicted himself by stating that he did not accept that the Abakiga overwhelmed the Accused. The Prosecution's contention that the Abakiga did not 'exist' was made for the first time in the Prosecutor's closing arguments, and is contrary to the Prosecution's own witnesses who speak of Abakiga attacking Tutsis, in Mabanza *commune*. Notwithstanding the above assertion by the Prosecution, it presented no evidence that the Accused solicited the presence of the Abakiga during the events.

[61] Transcripts 2 June 2000 at page 86

[62] Transcripts 23 November 1999 at pages 31-32

[63] *Ibid* at 33-34

[64] *Ibid* at 35-36

[65] Transcripts 2 May 2000 at pages 42-43

[66] Defence exhibit 18

[67] Prosecution exhibit 84

[68] Prosecutor's Closing Brief at pages 49 - 54

[69] Transcripts 27 April 2000 at page 48

[70] Prosecution exhibit 77

[71] See Judgment of the majority, Chapter V

[72] Defence exhibit 18, correspondence no. 0303

[73] Transcripts 6 June 2000 at page 119

[74] Transcripts 3 May 2000 at pages 80-81

[75] *Ibid* at page 41

[76] *Ibid* at page 58

[77] Transcripts 28 April 2000 at page 27

[78] Prosecutor's Closing Brief, Part I at paragraphs 298-300

[79] Defence exhibit 18, correspondence no. 0291

[80] Defence exhibit 18, correspondence no. 0294

[81] Defence exhibit 18, correspondence nos. 0308 and 0311, respectively

[82] Defence exhibit 112

[83] Transcripts 6 June 2000 at page 59

[84] Prosecutor's Closing Brief Part I at paragraphs 294-298

[85] Defence exhibit 93

[86] It is apparent that all those who had been recorded in the *Registre des Residents*, in Mabanza, during 1994, were recorded as being from the 'Hutu' ethnic group. See Defence exhibit 93

[87] Defence exhibit 18, correspondence no. 0279

[88] Defence exhibit 18, correspondence no. 0286

[89] See e.g., Defence exhibit 18, correspondence nos. 0135, 0320, 0332, 0340, 0341, 0353, 0367, and 0368

[\[90\]](#) Defence exhibit 94 and 95 are letters, dated 2 May 1994, from the Accused to the said driver and to the communal policeman, respectively

[\[91\]](#) Prosecutor's Closing Brief Part I at paragraph 276

[\[92\]](#) Transcripts 6 June 2000 at pages 116-117

[\[93\]](#) *Ibid* at pages 100 -101

[\[94\]](#) Transcripts 5 June 2000 at page 69

[\[95\]](#) Transcripts 9 June 2000 at page 60.

[\[96\]](#) Transcripts 5 June 2000 at pages 66-67

[\[97\]](#) See *Prosecutor vs Clement Kayishema and Obed Ruzindana*, (ICTR-95-1-T), Judgment, 21 May 1998

[\[98\]](#) See *Prosecutor vs Jean Kambanda*, (ICTR-97-23-S), Judgment and Sentence, 4 September 1998

[\[99\]](#) Transcripts 23 May 2000 at page 15 (in camera)

[\[100\]](#) Defence exhibit 112

[\[101\]](#) Transcripts 5 June 2000 at pages 140-141

[\[102\]](#) Transcripts 8 February 2000 at pages 21-23

[\[103\]](#) Transcripts 5 June 2000 at page 125

[\[104\]](#) Prosecution exhibit 84

[\[105\]](#) Transcripts 7 June 2000 at pages 110-111

[\[106\]](#) The Defence stated in its oral closing arguments that it had requested these transcripts from Radio Muhabura, which request was denied.

[\[107\]](#) Defence Closing Brief at pages 102-108

[\[108\]](#) Prosecutor's Closing Brief Part I at paragraph 278

[\[109\]](#) Transcripts 1 June 2000 at pages 72-73

[\[110\]](#) In a document entitled 'Evaluation Sheet Covering Period 1 April 1993 to May 1994', signed by Bagilishema, reference is made to the misappropriation of communal funds by Semanza. See, Defence exhibit 20

[\[111\]](#) Prosecution Counsel stated, "all these documents concerning Semanza taking over are not disputed." See Transcripts 1 June 2000

[\[112\]](#) Defence exhibit 24

[\[113\]](#) Defence exhibit 23

[\[114\]](#) Defence exhibit 22

[\[115\]](#) Transcripts 1 June 2000 at page 85

[\[116\]](#) Transcripts 3 May 2000 at page 29 (in camera)

[\[117\]](#) Transcripts 22 May 2000 at page 105

[\[118\]](#) Prosecution exhibit 84

[\[119\]](#) In this regard the Accused asserted that Semanza had appointed himself as *bourgmestre*, whereas the law provided that, in such circumstances, the *bourgmestre* should be replaced by a *conseiller*.

[\[120\]](#) Defence exhibit 112

[\[121\]](#) Prosecutor's Closing Brief at paragraph 72

[\[122\]](#) Prosecutor's closing argument, transcripts 18 October 2000 at pages 220 - 239

[\[123\]](#) Defence exhibit 112